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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SUMITOMO SHOJI AMERICA, INC.,

Petitioner and Cross-Respondent,

v.

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JUANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER, ELIZABETH WONG,

Respondents and Cross-Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *AMICUS CURIAE*

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I. Statement of Interest

The N.A.A.C.P. is the nation's oldest and largest civil rights organization. It is organized, *inter alia*, to protect and expand the employment opportunities of black persons. With the proliferation of foreign-owned/operated companies and subsidiaries in the United States, the N.A.A.C.P. has a specific and intense interest that these generally be held subject to the same standards of non-discrimination in

employment relationships and terms as are American businesses. The case at bar raises the issues of: (1) whether wholly-owned foreign subsidiaries, organized under American law, are to be exempt from the coverage of Title VII and, if not, (2) whether any protection afforded, *inter alia*, blr k persons by Title VII will be watered down in light of the asserted interests or needs of such wholly-owned subsidiaries. While we agree with the conclusion on the first issue reached by the Circuit Court below, we believe that its formulation of the standard to be applied in determining whether Sumitomo may use national origin as a *bona fide* occupational qualification (bfoq) is considerably broader than justified by Title VII and would, if adopted, substantially vitiate the protections provided by that statute.*

II. Statement of the Case

We adopt respondent *Avigliano, et al.'s*, statement of the case and its analysis of the inapplicability of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2063 ("The Treaty") to wholly-owned subsidiaries incorporated in the United States.**

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* Our concern is heightened by the decision of the Fifth Circuit in *Speiss* v. *C. Itoh & Co.*, 25 FEP Cases 849, 855 (1981), which held, we believe erroneously, that "it is irrelevant whether the source of potential interference with that right (of Japanese companies to manage their own affairs) is state legislation characterized as 'ultranationalistic' or a federal statute labeled 'progressive.'" Surely this is incorrect; the effect of Article VIII, as a shield to prevent the operation of state laws which would have barred the employment of *any* Japanese worker, however qualified, does not entail the conclusion that the same provision may be used as a sword to justify affirmative discrimination where same is not justified under Section 703(e).

** We agree with the conclusions reached by both Courts below that "the effect of the Treaty is to assure that nationals of one

III. Summary of Argument

Assuming that this Court affirms the Second Circuit's conclusion that Sumitomo, as a wholly-owned subsidiary, falls within the compass of the Treaty, the company should not thereby receive blanket exception to Title VII. The "of their choice" language in Article VIII of the Treaty is not made superfluous by the application of Title VII to such entities. Instead, the language negotiated in 1953 evidences an intent to protect foreign companies from the reach of the prevalent restrictions against the employ of non-citizens within the bounds of certain American states. To permit this provision, meant to insure more equitable employment practices, now to work a discriminatory result against American workers would conflict with the purposes of the Article itself, as well as compromise the crucial national purposes advanced by Title VII.

Applying Title VII to Sumitomo carries as well the exception to non-discrimination codified in Section 703(e) of Title VII which permits an employer to recognize bfoqs and hire accordingly. In guiding the district court on the issue of what constitutes a showing of "business necessity", justifying discrimination in hiring, the Second Circuit gave impermissively great weight to the acceptability of female workers to "those persons with whom the company or branch does business," and to Japanese "customs." This "Hecklers' veto" standard should not be identified as co-equal with factors which bear directly on the company's capacity to hire persons able to perform essential business functions.

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party are not discriminated against within the territory of the other." 473 F. Supp. 506, 509 (S.D. N.Y. 1979); Slip op. at 638 F.2d 553, 555 (2d Cir. 1981).

IV. Argument

A. *The 1953 Treaty Sought to Ease Barriers to the Entry of Japanese Workers, Not to Exempt Japanese Subsidiaries From American Civil Rights Laws*

By 1953 Congress had not extended specific civil rights protections by statute to minority or women workers. It is difficult, therefore, to argue, as does petitioner, that the draftees of the 1953 Japanese-American commercial treaty intended to override the application of such statutes to Japanese businesses. Moreover, as respondents have shown, Article VIII was designed specifically to override certain state prohibitions against the employment of Japanese aliens. The employment provisions of the Treaty eliminated discrimination, and did not contemplate granting broad exceptions to civil rights legislation like Title VII. See H. Walker, *Companies,* Chapter 7 in R.R. Wilson, *United States Commercial Treaties and International Law,* 182, 197-198 (1960); Steiner & Vaghts, *Transnational Legal Problems,* 37-38 (Foundation Press, 1968).

The burden of proving that Title VII intended such broad exceptions lies with petitioners and in light of section 703(e)'s recognition of *bona fide occupational qualifications,* it is difficult to understand why Congress would have *sub silentio* intended Title VII not to apply across-the-board to foreign corporations or their subsidiaries. It makes more sense to conclude that Title VII applies to all employers not specifically excepted on its face and requires that any specific circumstances of business necessity which might justify employment discrimination be substantiated on a case-by-case basis.

B. *Sumitomo Should Be Required to Meet the Same Rigorous Standards for Invocation of the BFOQ as Any Other Employer Covered by Title VII*

By passing Title VII, Congress endorsed two central propositions: (1) that our national economy would be enhanced by eradicating artificial stereotypic obstacles to equal treatment by employers and (2) that personal fulfillment and actualization must be protected against the application of *per se* rules disqualifying persons from employment or conditioning employment due to impermissible factors not essentially related to those skills demanded by a particular job. *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977); *Usery* v. *Tamiani Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976).

Since the earliest interpretations of the bfoq exception, courts have guarded against permitting expansive factors to negate the central purposes. *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 546 (Marshall, J.). In a society rife with discriminatory and stereotypic attitudes, it has been recognized that allowing customers' biases to define who may/may not be acceptable in certain jobs would invite the emasculation of Title VII. As the Supreme Court noted in *Dothard, supra,* the

> virtually uniform view of the federal courts is that §703(e) provides only the narrowest of exceptions to the general rule requiring equality of employment opportunities.
>
> The care with which Congress had chosen the words (of section 2000e-2(e)) to emphasize the function and to limit the scope of the exception indicate that it had no intention of opening the kind of enormous gap in the law which would exist if [for example] an employer could legitimately discriminate against a group solely because his *employees, customers* or clients, dis-

> criminated against that group. Absent much more explicit language such a broad exception should not be assumed for it would largely swallow up the Act.

65 Mich. L. Rev. (1966), quoted in *Diaz* v. *Pan Am. World Airways, Inc.*, 442 F.2d 385, 387 (5th Cir. 1971).* Consistently, *Diaz* rejected Pan Am's argument that, since its passengers preferred female stewardesses to male stewards, it could exclude all men from such roles on domestic flights. See also, *Wilson* v. *Southwest Airlines Co.*, 26 EPD §31.949 (ED Texas 1981). Likewise, the EEOC has always narrowly interpreted the *bfoq* provision, specifically rejecting its predication upon the preferences of co-workers, possible customers and the like. 29 C.F.R. 1604.1(a), *et seq.*

Apart from upholding Title VII against the prejudices of potential business clientele, the courts have required employers to *particularize* their need to discriminate and not merely to elicit general testimony in support of pervasive favoritism. *Swint* v. *Pullman Standard*, 624 F.2d 525, 534 (5th Cir. 1980). Thus a foreign company seeking to exclude women accountants who have minimal client contact on the basis that their employ would violate traditional customs has *not* made the requisite showing of business necessity. The latter demands evidence specifically linking the operation of the bfoq to the actual delivery of safe and efficient business services. *Burrell* v. *Eastern Airlines, Inc.*, 633 F.2d 361, 370 (4th Cir. 1980). (". . . the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be no acceptable alternative policies or practices which would better accomplish the business purposes advanced . . .").

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* The *Diaz* court used even stronger language in holding inapposite such biases, ". . . it would be totally anomalous if we were to allow the preference and prejudices of customers to determine whether the sex discrimination was valid." (*Id.* at 389).

The Ninth Circuit recently had occasion to deal with the precise issues now before this Court in *Fernandez* v. *Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981). The district court had found that a company doing business in Latin and South America could exclude women from executive roles, concluding: "whatever views Americans may hold regarding business and social customs, it was not merely for convenience of itself or its customers that Wynn Oil refused to consider a woman for that position. To have hired Ms. Fernandez, regardless of her qualifications, would have *totally* subverted any business Wynn hoped to accomplish in those areas of the world." *Id.*, 20 FEP cases 1163 (CD Cal. 1979).

Despite the apparent definitiveness of the district court's factual conclusions, the Ninth Circuit reversed stating:

> The district court found that sex discrimination must be compelled by business considerations in order to qualify as a BFOQ. It also stated that customer preference should not be bootstrapped to the level of business necessity. Nevertheless, it held that customer preferences rise to the dignity of a *bona fide* occupational qualifications if "no customer will do business with a member of one sex because it would destroy the essence of the business or would create serious safety and efficacy problems." On this basis, the district court found the customer preferences of Wynn's clients a BFOQ.
>
> That conclusion cannot stand. Title 42 U.S.C. §2000e-2(c) permits hiring decisions to be based on gender if gender is a bfoq reasonably necessary to the normal operations of that particular business. *However, stereotypic impressions do not qualify gender as a BFOQ. City of Los Angeles Department of Water* v.

> *Manhart*, 435 U.S. 702, 707 (1978). *See Blake* v. *City of L.A.*, 595 F.2d 1367 (9th Cir. 1979), *cert. denied*, 445 U.S. 28 (1980). Nor does stereotyped customer preference justify a sexually discriminatory practice. (Citations omitted). (emphasis added).

And, directly on point, the Circuit chastized the District Court's distinction of *Diaz, supra*, which rested on the assertion of a separate rule of bfoqs in international contexts. "Such a distinction," the Ninth Circuit held, "is unfounded. Though the United States cannot impose standards of nondiscrimination on other nations through its legal system, the district court's rule would allow other nations to dictate discrimination in this country. No foreign nation can compel the non-enforcement of Title VII here."

Likewise, this Court should instruct the Second Circuit to revise its standards on bfoq to ensure that matters relating to stereotype, rather than capacity to perform, play no part in any bfoq determination. Specifically, and with respect to plaintiffs before this Court, no inquiry should be permitted into the "acceptability [of women as a class] to those persons with whom the company or branch does business." Finally, whatever degree of knowledge and skill a district court requires of these female plaintiffs should be required of men currently holding the positions which the women sought.

C. *Sumitomo's Discrimination on the Basis of Sex and National Origin Is Prohibited by Title VII*

While admitting that "it prefers Japanese nationals, as opposed to nationals . . . of all other countries," (Brief of Petitioner at 17), petitioner suggests that this is not a discrimination based on national origin. And, while conceding the male-dominated nature of its executive work

force, petitioner claims that this is not the result of discrimination based on sex. Indeed, petitioner claims that *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86 (1973) and *Morton* v. *Mancari*, 417 U.S. 535 (1974) "are dispositive" of the issues raised by this case as they allegedly evidence this Court's approval of discrimination based on "national origin". In fact, neither case supports petitioner's position, and *Espinoza* reiterates Title VII's prohibition of discrimination based, as is Sumitomo's, on national origin in the absence of the particularized BFOQ showings discussed *infra*.

In *Espinoza*, petitioner challenged Farah's longstanding policy to hire only American citizens. Farah, an American company, proved that over 95% of the employees at the plant where Mrs. Espinoza applied for work were Mexican-Americans, rebutting any suspicion of national origin-based discrimination. This Court, Marshall, J., held that discrimination based upon American *citizenship* was not actionable under Title VII. "Aliens are protected from illegal discrimination under the Act (Title VII), but nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage." 414 U.S. at 95. To the contrary, respondents expressly claim that Sumitomo limited their opportunities for advancement on the basis of their *sex* and *national origin*, both of which, unlike alienage and citizenship, are expressly prohibited classifications under Title VII. *Cf. Dowling* v. *United States*, 476 F.Supp. 1018 (D. Mass. 1979) (district court rejected hockey referee's claim of discrimination based on citizenship requirement). Unlike Farah, which showed a pattern of hiring persons of Mexican origin, Sumitomo has not demonstrated, and respondents cannot show, that its promotion practices are consistent with the proscriptions of Title VII. It is this

issue which must be tried on remand, using an appropriate BFOQ standard.

Likewise, *Morton* v. *Mancari*, 417 U.S. 575 (1974) offers petitioners no support; therein, this Court upheld a long-standing preference in both hiring and promotion by the Bureau of Indian Affairs for native-Americans. Writing for a unanimous Court, Justice Blackmun found this preference served several important national purposes: "to give Indians greater participation in their own self-government; to further the government trust obligation toward the Indian tribes and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life." *Id.* at 542. Moreover, Congress specifically had exempted Indian employment preferences from the initial coverage of Title VII and this Court perceived no legislative intent to change these policies through the 1972 amendments to Title VII. Only by perverted logic can *Morton*, a case reiterating protection accorded to an insular and unique minority, be construed to justify discrimination against women.

In short, Sumitomo has not differentiated its discriminatory practices from those expressly prohibited by Title VII. Now admitting that Title VII extends to its practices, Sumitomo must meet the rigorous requirements of the BFOQ standard and justify its apparent and absolute requirements of gender and national origin for *executive* positions.

V. Conclusion

For the reasons set forth above, the decision below should be affirmed with instructions to modify the standards for adjudging bfoq suggested therein.

Respectfully submitted,

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